



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

JUN 10 2010

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Grant Woods, Esq.
Brennan House
1726 North Seventh Street
Phoenix, AZ 85006-2230

RE: MUR 6242

Dear Mr. Woods:

On June 4, 2010, the Federal Election Commission reviewed the allegations in your complaint dated December 15, 2009, and its supplement dated December 22, 2009, and found that on the basis of the information provided in your complaint, and information provided by the respondents, there is no reason to believe Clear Channel Communications, Inc. and J.D. Hayworth 2010 and Kelly Lawler, in her official capacity as Treasurer, violated 2 U.S.C. § 441b. Accordingly, on June 4, 2010, the Commission closed the file in this matter.

Documents related to the case will be placed on the public record within 30 days. See Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70,426 (Dec. 18, 2003). The Factual and Legal Analysis, which more fully explains the Commission's finding, is enclosed.

The Federal Election Campaign Act of 1971, as amended, allows a complainant to seek judicial review of the Commission's dismissal of this action. See 2 U.S.C. § 437g(a)(8).

Sincerely,

Mark D. Shonkwiler
Assistant General Counsel

Enclosure
Factual and Legal Analysis

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FEDERAL ELECTION COMMISSION

FACTUAL AND LEGAL ANALYSIS

RESPONDENTS: J.D. Hayworth 2010 and Kelly Lawler, MUR: 6242
in her official capacity as Treasurer
Clear Channel Communications, Inc.

I. INTRODUCTION

This matter was generated by a complaint filed by Grant Woods. *See* 2 U.S.C. § 437(g)(a)(1). The available information indicates that Clear Channel Communications, Inc. ("Clear Channel"), did not make, and J.D. Hayworth 2010 and Kelly Lawler, in her official capacity as Treasurer (the "Committee"), did not accept, a corporate in-kind contribution in connection with the broadcast of The J.D. Hayworth Show (the "Show") on AM radio station KFYI, serving Phoenix, Arizona ("KFYT").

II. FACTUAL AND LEGAL ANALYSIS

A. Factual Background

Clear Channel Communications, Inc., is a media and entertainment corporation specializing in radio programming and outdoor advertising. Clear Channel owns KFYI, which broadcasts nationally syndicated talk shows, such as The Rush Limbaugh Show and The Sean Hannity Show, in addition to local programming. Clear Channel Resp., 1. Until recently, KFYI's local programming included The J.D. Hayworth Show.

J.D. Hayworth is a former U.S. Congressman (1994-2006), as well as a current candidate for Republican nominee to the U.S. Senate from Arizona in the 2010 election. J.D. Hayworth 2010 is Hayworth's principal campaign committee. Hayworth has had a career as a professional television and radio broadcaster that began approximately thirty years ago. Committee Resp., 3. Even while serving in Congress, Hayworth worked as a

1 fill-in host for at least two nationally syndicated radio shows. *Id.* Furthermore, during
2 his tenure on the Show, he made frequent guest appearances on national cable television
3 outlets, such as Fox News Channel, Fox Business Network, and CNBC. *Id.* at 2-3.

4 Hayworth began hosting the Show on April 26, 2007, shortly after the 2006
5 Congressional elections. *See* Committee Resp., 2. The Show ran from 4:00 PM to 7:00
6 PM on weekdays for nearly three years, and content consisted of “‘newstalk’—whatever
7 happens in the headlines, prompting commentary from [Hayworth’s] unique
8 perspective.” *See* Clear Channel Resp., 2 (*quoting* <http://www.jdhayworth.com>¹). Topics
9 ranged “from immigration reform to pro-growth economics to the ins-and-outs of
10 political campaigns.” *Id.*

11 On January 22, 2010, the Show aired its final broadcast amid speculation that
12 Hayworth intended to challenge Senator John McCain for the Republican nomination in
13 the party’s August 2010 Senate primary. Hayworth officially announced his candidacy
14 for the Senate on February 15, 2010. *See* Arizona Daily Star, *Hayworth Enters U.S.*
15 *Senate Race*, http://azstarnet.com/article_01f227ad-c734-5e2e-9197-80bbefddc2d4.html
16 (last visited on February 16, 2010).

17 Complainant alleges that Clear Channel made, and the Committee accepted,
18 prohibited corporate in-kind contributions in violation of the Federal Election Campaign
19 Act of 1971, as amended (the “Act”). Specifically, the Complaint alleges that Hayworth
20 began “testing the waters” of a Senate candidacy as early as April 24, 2009, *see* Compl.,
21 2, and that Hayworth’s commentaries on the Show regarding his eventual opponent
22 constituted “coordinated communications” that resulted in Clear Channel making

¹ This website now redirects to <http://www.jdforsenate.com/>, but as of February 3, 2010, it contained the quoted material.

1 prohibited contributions to the Committee in amounts of as much as \$540,000 per week.
2 See Compl., 3-4. Complainant further alleges, without elaboration as to the basis, that
3 these violations were knowing and willful. *Id.*

4 Complainant filed a Supplement to the Complaint on January 6, 2010, containing
5 unofficial transcripts of portions of seven broadcasts of the Show, each allegedly
6 indicating Hayworth's interest in running for Senate and/or his desire to see McCain
7 defeated in the 2010 primary. See generally Compl.; Supplement to Compl. Several
8 statements contained in the transcripts pertain to a series of public opinion polls—two
9 commissioned by Rasmussen Reports and one hosted online at KFYI's website—that
10 pitted Hayworth against McCain in a potential primary matchup. See, e.g., Compl., 3, n.
11 11; Supplement to Compl., 10-11, 13, 15-16, 20-24, 26-27, 31-34, 36-37, 39, 41, 43-46,
12 48.

13 Clear Channel filed a response to the Complaint and Supplement to Complaint on
14 February 3, 2010, contending that the Complaint fails to allege a violation of the Act or
15 its accompanying regulations for three reasons: (1) the costs incurred in broadcasting the
16 Show qualify for the press exemption; (2) "coordination restrictions only apply to
17 candidates, and Mr. Hayworth was not a candidate while he was hosting" the Show; and
18 (3) the costs incurred by Clear Channel in producing and broadcasting the Show "were
19 not subject to the restrictions of the testing the waters exception." Clear Channel Resp.,
20 8.

21 The Committee filed a response to the Complaint and Supplement to Complaint
22 on April 6, 2010, arguing that the Respondents did not violate the Act because: (1) the
23 press exemption applies to the alleged violations in this case; and (2) even if the press

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1 exemption did not apply, Hayworth was not a candidate at the time the alleged violations
2 occurred. *See* Committee Resp., 1.

3 **B. Legal Analysis**

4 The Act prohibits corporations from making contributions from their general
5 treasury funds in connection with the election of any candidate for Federal office.
6 2 U.S.C. § 441b(a); 11 C.F.R. § 114.2(b)(1). The Act and Commission regulations define
7 the term "contribution" to include any gift of money or "anything of value" for the
8 purpose of influencing a Federal election. *See* 2 U.S.C. § 431(8)(A); 11 C.F.R.
9 § 100.52(a). The term "anything of value" includes all in-kind contributions, 11 C.F.R.
10 § 100.52(d)(1), such as communications that are coordinated with a candidate. 11 C.F.R.
11 § 109.21. Exempt from the definition of contribution, however, are "any cost[s] incurred
12 in covering or carrying a news story, commentary, or editorial by any broadcasting
13 station (including a cable television operator, programmer or producer), Web site,
14 newspaper, magazine, or other periodical publication . . . unless the facility is owned or
15 controlled by any political party, political committee, or candidate[.]" 11 C.F.R. §
16 100.73. This exclusion is known as the "press exemption."

17 The Commission conducts a two-step analysis to determine whether the press
18 exemption applies. First, the Commission asks whether the entity engaging in the
19 activity is a press entity as described by the Act and regulations. *See* Advisory Opinion
20 2005-16 (Fired Up!). Second, in determining the scope of the exemption, the
21 Commission considers: (1) whether the press entity is owned or controlled by a political
22 party, political committee, or candidate; and, if not, (2) whether the press entity is acting
23 as a press entity in conducting the activity at issue (i.e., whether the entity is acting in its

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1 “legitimate press function”). *See Reader’s Digest Association v. FEC*, 509 F. Supp.
2 1210, 1215 (S.D.N.Y. 1981). If the press entity is not owned or controlled by any
3 political party, political committee, or candidate, and if it is acting as a press entity with
4 respect to the conduct in question, the Commission lacks subject matter jurisdiction over
5 the complaint. *FEC v. Phillips Publishing, Inc.*, 517 F. Supp. 1308, 1313 (D.D.C. 1981).

6 Complainant acknowledges that Clear Channel, a global media and entertainment
7 corporation specializing in radio programming and outdoor advertising, is a press entity
8 as described by the Act and Commission regulations. Complainant alleges, however, that
9 because Hayworth, as a putative candidate, “control[ed] all content and messages aired
10 on KFYI during his regular show on weekdays from 4pm to 7pm,” the broadcasts fail the
11 “owned or controlled” requirement of the press exemption. Compl., 2. Commission
12 decisions on past MURs involving radio talk show hosts who later become candidates
13 have never found that a host/candidate “owned or controlled” the entity for purposes of
14 the press exemption on the basis that the host/candidate had a role in determining
15 program content. *See, e.g.*, MUR 5555 (Ross); MUR 4689 (Dorman).

16 Two considerations in determining whether an entity is acting in its legitimate
17 press function include whether the entity’s materials are available to the general public
18 and whether they are comparable in form to those ordinarily issued by the entity.
19 Advisory Opinion 2005-16 (Fired Up!) (*citing FEC v. Massachusetts Citizens for Life*
20 (*“MCFL”*), 479 U.S. 238, 251 (1986)). Here, we first note that the broadcasts were
21 available to the general public. Second, the broadcasts as transcribed in the Complaint
22 and Supplement to Complaint appear to be comparable in form to those broadcasts of the
23 Show ordinarily issued by the entity, which broadcasts maintained a “newstalk” format

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1 consisting of "news, commentary and editorial" material on a variety of topics. *See* MUR
2 5555 (Ross) (radio talk show host who became a candidate was eligible for the press
3 exemption where program format did not change after he began to consider candidacy);
4 MUR 4689 (Dornan) (radio guest-host who later became a candidate was eligible for the
5 press exemption for commentary critical of eventual opponent where there was "no
6 indication that the formats, distribution, or other aspects of production" were any
7 different when the candidate hosted than they were when the regular host was present).
8 In sum, Clear Channel was acting within its legitimate press function in broadcasting the
9 Show, and the Respondents are therefore subject to the press exemption. Accordingly,
10 the Commission finds no reason to believe Clear Channel Communications, Inc., or J.D.
11 Hayworth 2010 and Kelly Lawler, in her official capacity as Treasurer, violated 2 U.S.C.
12 § 441b.

13 Because the press exemption applies to the alleged contributions in the present
14 case, it is unnecessary to consider whether some of the activities might qualify for the
15 testing the waters exemption or constitute coordinated communications. Further, because
16 there is no violation of the Act, the allegation that the Respondents acted knowingly and
17 willfully is moot.

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